

# Fax

**To:** Renata Hesse

**From:** Kenneth Brown

**Fax:** 202-616-9937

**Pages:** 7

**Phone:** 202-307-1454

**Date:** 1/28/2002

**Re:** Tunney Act Comments

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Ken Brown

January 28, 2002


Renata Hesse  
Trial Attorney  
Antitrust Division  
U.S. Department of Justice  
601 D Street, N.W. Suite 1200  
Washington, D.C. 20530

e-mail: [microsoft.atr@usdoj.gov](mailto:microsoft.atr@usdoj.gov)

Re: AdTI Tunney Act Comments

The Alexis de Tocqueville Institution submits these comments under the Tunney Act. The Alexis de Tocqueville Institution is an independent non-profit education and research organization described in detail at [www.adti.net](http://www.adti.net). The mission of AdTI is to provide helpful policy analysis to advance the ideas of democracy and freedom around the world.

Sincerely,

  
Kenneth Brown  
President

Telephone Number(s)- office 202-548-0006, cell 703-608-4222



## Why the Microsoft Case Should Be Settled

Alexis de Tocqueville Institution  
Washington, D.C.  
January 22, 2002

### The Hard Truth About Invention in the U.S. Marketplace

Two courts have reaffirmed that Netscape nor its browser were shut out of the marketplace. The browser wars produced a winner and a loser; and Netscape was the loser. However, within thousands of briefs and legal arguments criticizing the U.S. vs. Microsoft settlement is the repeated concern about the future of new Netscape's in the technology sector. Almost every other issue is tangential, and we must differentiate the arguments properly.

We see an interchanging of terms being used, specifically, "...the settlement should make the marketplace safe for firms to compete with Microsoft..." vs. "...the settlement should be safe for firms to introduce new products...ie. like Netscape Navigator..." The Department of Justice has proposed a settlement that properly speaks to its duty - to introduce a remedy which allows firms to safely introduce new products. Microsoft has agreed to the rules; which include a mandate that Microsoft disclose any information necessary for rival firms to produce fully interoperable products with Windows for competing software and servers.

The reason why critics want a settlement which goes further is because they want Microsoft completely out of the way. The case is merely obfuscation. With billions of dollars in resources, Microsoft's competitors want every advantage because 1) the marketplace for new technology is overwhelming and having a chief competitor eliminated makes things a little easier and 2) the competitors lobbying for a far-reaching settlement are among the most aggressive and fierce technologists in the world.

The reality is that the marketplace, particularly the marketplace for new technology has never been safe from a competitor. What Microsoft's competitors want is an oxymoron because no technology product is ever "competition-free" or guaranteed success in the marketplace. This benefits consumers, the country and ironically inventors themselves, which makes it relevant to observe the reality of the marketplace (beyond the courtroom) for a moment.

#### Great Inventors Must Be Fierce Strategists

Every inventor and innovator small and large must face the formidable odds to succeed in the marketplace for new technology. Since the day the first idea was registered in the U.S. patent office, countless inventions and innovations have become cinders in the furnace of competition. Relentless markets in America only sustain the fiercest competitors, without exception. Technologists rewarded with fabulous wealth and fame did so at the expense of employing hard-hitting, merciless strategies. Regardless of ingenuity, technologists without the ability to navigate in the marketplace were failures; and lucky to even receive credit as creators of their own inventions.

The marketplace for food, furniture and other goods each have their challenges. But, the technology marketplace is unique because it demands both inventive genius and keen business savvy. The combination of the two is rare in individuals and corporations, and particularly scarce among pure inventors such as physicists, mathematicians or engineers. From the light bulb to the PC operating system, every innovator that history has been kind to, had the indomitable capability to merge intellectual power with commercial insight. In the

end, technologists with these qualities became far more successful than their counterparts with better inventions or greater talent.

#### Competitive Inventors Preserve U.S. Leadership

However, America's owes its technological leadership in the world to its competitive battleground. Although education, vigorous intellectual property rights and democracy are also credit to American invention, its ability to surface inventors with commercial savvy, make it a source of the most competitive innovations in the world.

In the end, the U.S. is a leader in world-changing innovations, at the expense of sustaining a "bare-knuckled" marketplace.

After an excruciating and lengthy examination by the court system, the federal government and 9 states (actually 41 when you consider the states that never filed suit) agree on the U.S. vs. Microsoft settlement. Regardless of the differences among the parties, we can't expect any ruling to settle the differences between Microsoft and its competitors. However, this dissatisfaction is in the best interest of our country and will only spawn better ideas and products that will propel the U.S. to new heights. U.S. technological leadership depends on the undying will of its innovators to be no. 1.

#### The "Electric" War Between Edison and Tesla

The debate over Windows is similar to many stories about wars between rival innovators throughout history, particularly aspects of the Thomas Edison story. Although the Edison-Tesla rivalry did not involve anti-trust law, the contest details the reality of the "invention business" in the most competitive capitalist society in the world.

Contrary to popular belief, the idea of electric lighting was not Edison's. A number of individuals had developed forms of electric lighting, but none had developed a system that was practical for home use. Using lower current, a small carbonized filament, and an improved vacuum inside the bulb, Edison was able to produce a reliable, long-lasting source of light. Thomas Edison didn't "invent" the light bulb, but became a legend for making a 50-year-old idea a fantastic commercial success.

Edison's fiercest rival, was an ex-employee named Nikola Tesla from Smiljan, Croatia. Tesla was a genius who invented the fluorescent bulb in his lab forty years before industry "invented" them. At World's Fairs and similar exhibitions, he demonstrated the world's first neon signs. Perhaps Tesla's greatest invention was the AC (alternating current) system we use in our homes today. DC (direct current), an inferior system, ironically, was designed by Thomas Edison. After years of fierce wars and debate between the Tesla and Edison teams, AC became the accepted system of transporting electricity. In fact, Edison later admitted that AC was the better system.

While both men were geniuses ahead of their time, the biggest difference between Edison and Tesla was their perspective and approach to invention. Edison had a keen understanding of capital markets and the strategies necessary to finance, promote and commercialize his inventions. Tesla was a great theoretician who worked perpetually to finance experiments.

Edison held a world record 1,093 patents and died a wealthy, famous man. Tesla received over 800 patents, died penniless and was literally erased from the history books. In fact, Tesla was poor the last thirty years of his life and arguably would have eclipsed Edison's patent record if he had the capital. Remembered for many things, Edison was known for

saying, "I have more respect for the fellow with a single idea who gets there than for the fellow with a thousand ideas who does nothing." Edison's vision reflects the view of anti-trust law, that the greater value is in a stable marketplace, not the resurrection of competing ideas.

### The Other Truth about Netscape

The Appeals Court ruling reflects another hard truth - Netscape fell, because it did. The D.C. Circuit rejected the course-of-conduct theory, under which Microsoft's specific practices could be viewed as part of a "broad monopolistic scheme." This obviously has made anyone that viewed Microsoft as an evil-doer exponentially dissatisfied with DOJ's settlement. But again, is the responsibility of the DOJ to make the world safe from Microsoft?

Netscape maintained its Internet dominance until 1997, when Internet Explorer's fourth version was able to lap Netscape. Netscape Navigator never regained its prominence. In addition, by that time, the Netscape product was slow, outdated, and unstable, falling to a swifter surging Internet Explorer.

But perhaps the most unmentioned reality regarding Netscape's fall was their announcement to all (Microsoft included) that their strategy was to be the middleware that would be the "new" Windows, removing Microsoft's flagship product from dominance. Hindsight is 20/20 but when you consider how far ahead Netscape was in front of Microsoft, there are infinite what if's to consider if it had been mum about its strategy to take on Redmond. Microsoft had all but ignored the Internet and it is very questionable if they would have been able to play catch-up to a well-funded and branded Netscape team. The outcome of this possibility almost completely counters any damage claims in their civil suit recently announced. After all, Netscape's grand plan was never realized, thus the future is incalculable especially when taking into consideration the hubris of Netscape.

### Innovators are the Lifeblood of U.S.

Today, new technology firms use every means available to compete including spending billions of dollars on research and development. Sun Microsystems, IBM and AOL and Microsoft combine to spend over \$100 billion annually just on research and development. Firms spend exorbitant amounts of money to create and protect to new products. But again, this competition is to the benefit of inventors and the U.S. marketplace. <sup>1</sup>Recently, the United States Patent Office released its annual list of the top ten private sector patent recipients. It reported that for the ninth consecutive year, IBM received more patents than any other organization in the world. "I am proud that American corporations are leaders among U.S. patent holders," said James E. Rogan, Undersecretary of Commerce for Intellectual Property. "Patents promote technological progress and are a potent source for competitive free enterprise."

USPTO's comments echo the importance of preserving the status quo of the U.S. marketplace.

In the end, it is in the interest of innovation that we close the chapter on U.S. vs. Microsoft. The judicial process has sorted through the facts and come to judgment. Those dissatisfied

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<sup>1</sup> U.S. Patent and Trademark Office. January 10, 2002.

with the settlement should be reminded by W. M. Deming's famous quip, "Learning is not essential, survival is not mandatory." Deming's point speaks not only to the Microsoft case; but the hard truth about invention and success in the technology business. The court system has done its job, and enough precious time has been dedicated to legal jurisprudence. It is now the time for Microsoft and its opponents to tuck in their chin, learn from their mistakes and return to the marketplace.

\*U.S. Patent and Trademark Office (USPTO) List of Top 10 Patent Recipients

\*Source: USPTO, January 10, 2002. The listed patent counts are preliminary counts, which are subject to correction. The final listing of patent counts for the top patent organizations in 2001 should be available by early April 2002. Patent information reflects patent ownership at patent grant and does not include any changes that occur after the

Preliminary Rank In 2001	Preliminary # of Patents in 2001	Organization	Final Rank in 2000	Final Number of Patents in 2000
1	3,411	International Business Machines (IBM)	1	2,886
2	1,953	NEC Corporation	2	2,021
3	1,877	Canon Kabushiki Kaisha	3	1,890
4	1,6543	Micron Technology	7	1,304
5	1,450	Samsung Electronics Co., Ltd.	4	1,441
6	1,440	Matsushita Electrical Industrial Co., Ltd.	11	1,137
7	1,363	Sony Corporation	6	1,385
8	1,271	Hitachi, Ltd	13	1,036
9	1,184	Mitsubishi, Denki Kabushiki Kaisha	14	1,010
10	1,166	Fujitsu Limited	10	1,147